UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

UNITED STATES OF AMERICA, Respondent	))	
v.	)	Crim. No. 01-34-P-H
	)	Civ. No. 03-13-P-H
WILLIAM L. PAUL, Petitioner	))	

RECOMMENDED DECISION ON 28 U.S.C. § 2255 MOTION

William L. Paul plead guilty on September 4, 2001, to carjacking in violation of 18 U.S.C. § 2119.[1] He was sentenced to 150 months in prison on January 11, 2002. Paul has now filed a motion pursuant to 28 U.S.C. § 2255 seeking to vacate his sentence because he contends that the attorney that represented him on this federal charge was ineffective in three ways. (Docket Nos. 19 & 20.) The United States has filed a response (Docket No. 27), to which Paul has replied (Docket No. 28). Because this motion is without merit I recommend that the Court **DENY** Paul the relief he seeks.

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[1] The statute provides:

Whoever, with the intent to cause death or serious bodily harm takes a motor vehicle that has been transported, shipped, or received in interstate or foreign commerce from the person or presence of another by force and violence or by intimidation, or attempts to do so, shall—

(1) be fined under this title or imprisoned not more than 15 years, or both,

(2) if serious bodily injury (as defined in section 1365 of this title, including any conduct that, if the conduct occurred in the special maritime and territorial jurisdiction of the United States, would violate section 2241 or 2242 of this title) results, be fined under this title or imprisoned not more than 25 years, or both, and

(3) if death results, be fined under this title or imprisoned for any number of years up to life, or both, or sentenced to death.

18 U.S.C. § 2119.

Prosecution's Version of Events in Ogunquit, Maine, February 19, 2001

> [T]he government's evidence would show that on February 19, 2001, in Ogunquit, Maine, the defendant got into the back seat of a parked automobile where he forcibly restrained a 69 year-old woman. The defendant grabbed the woman around the neck, told her that he had a knife and ordered the woman's daughter, who along with the woman's other daughter was in the front seat, to drive away. The three women would testify that the defendant repeatedly shouted to the woman in the driver's seat: "drive or I'm going to cut her," and "start the car, start driving or I'm going to stab her." The woman in the back seat managed to break free and the defendant walked away. Several minutes later, Ogunquit police officers arrested William Paul near the scene of the crime. The testimony of several eye witnesses would positively establish that the defendant was the perpetrator of the above-described attack.
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> The evidence would further show that the automobile referred to above was a Dodge Neon, which was manufactured in Belvidere, Illinois and which had, on February 19, 2001, been driven from Massachusetts to Maine.

(Prosecution's Version at 1.) Paul does not challenge this description of the events in any meaningful way except that he does contend that the fact that his foot remained outside the vehicle during the incident is an indication of his intent to only rob the victims, rather than hijack the car.

Discussion

Paul is entitled to habeas relief from his federal conviction only "upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack." 28 U.S.C. § 2255 ¶1.

In order to establish that his attorney's representation violated his constitutional right to effective assistance of counsel guaranteed by the Sixth Amendment, Paul must make the two-pronged showing established in Strickland v. Washington, 466 U.S. 668

(1984) and extended to representation concerning guilty pleas in Hill v. Lockhart, 474 U.S. 52, 58-60 (1985). Paul must demonstrate that his counsel's performance was so deficient it fell below an objective standard of reasonableness. Strickland, 466 U.S. at 687-88. He must also show that he suffered meaningful, measurable prejudice as a consequence, see id. at 687; that is, but for the deficiency in counsel's performance he would have received a different, in this case, sentence, see id.; Knight v. United States, 37 F.3d 769, 774 (1st Cir. 1994).

A. The Two Claims Relating to the PSI and Sentencing Proceedings

1. The Reason for the Dismissal of the 1988 Gross Sexual Assault Charge

In his first ineffective assistance of counsel ground Paul asserts that his attorney was ineffective with respect to the Presentence Investigation Report (PSI) attribution of a 1988 violent sexual assault to Paul. In the "other criminal conduct" portion of the PSI, this paragraph appears:

> On 02/10/87, the defendant was charged in York County Superior Court, case number 87-1045, with Burglary, Attempted Rape, and Gross Sexual Misconduct and represented by Deborah Hjort, Esq. According to Biddeford Police Department records, on 02/9/87, the victim reported a residential burglary occurring during the prior few days while she was away. On 02/10/87, the victim was allegedly raped by the defendant. The defendant was indicted on 09/11/87; however, on 01/03/89, the case was dismissed due to the guilty pleas [to two other charges].

(PSI at 12 ¶40.)

Paul contends that he told his attorney that his DNA did not implicate him for this assault and that he had a rock-solid alibi. He contends that he had directed his attorney to contact attorney Deborah Hjort to flesh-out this challenge. According to Paul his attorney for the federal charges told Paul that he could not reach Hjort, even though she was now serving (in the accessible public position) of a state court clerk. Paul contends

that there is little doubt that the appearance of this unchallenged criminal conduct in the PSI influenced the sentencing judge because the judge mandated that Paul undergo three years of sexual offender counseling.[2]

Any argument that counsel was ineffective with respect to challenging the PSI's attribution of this criminal record to Paul is belied by the record. With respect to the 1988 charge, counsel relentlessly challenged its inclusion both directly and with respect to its effect on the general tenor of the report. Counsel first did so in a letter to the PSI preparer, indicating that the charge was dismissed because blood and semen samples excluded Paul as a putative defendant and that it should not be used to bolster the recidivist characterization of Paul. (Gov't Resp. Ex A. at 6, 8-9.)

The question of Paul's exoneration on the 1988 charge was next raised by counsel during the presentence conference. (Presentence Conference Tr. at 7.) At that juncture counsel indicated that Paul believed that the dismissal was not the result of other pleas but that he had been "actually cleared" in this case. (Id.) Counsel told the Court that his client was telling him that there was some sort of physical evidence that excluded Paul as the perpetrator. (Id. at 11.) In response, the probation officer indicated that she had no court documents reflecting the manner in which the charges were dropped and the prosecutor indicated that he was assuming -- and believed that the docket sheet would demonstrate -- that the 1988 charge was dismissed due to guilty pleas to two other charges. (Id. at 12.) The docket sheet was circulated. (Id. at 13.) Paul's attorney then stated, "given the seriousness of what we're talking about, I'm not willing to forego this

[2] Paul argues that this error was compounded by his attorney's failure to object to the PSI's description of Paul's refusal to get out of the back of the car. He asserts that one of the victims testified that he had one foot out of the car, a fact that supports the conclusion that he was attempting to "get the money and run" rather than initiating any sexual misconduct. (Sec. 2255 Mem. at 3.) In his response he explains that he only told the victims to drive after he lost his escape route and he panicked. (Reply at 3.)

objection because of the docket sheet." (Id. at 13.) Questioning the probation officer's conduct vis-à-vis proving information pertaining to other charges (id. at 13-15), Paul's attorney told the Court that he would try and call the attorneys involved in the matters to get some answers. (Id. at 13.) The Court indicated that the question of the 1988 dismissal would remain open. (Id. 15.)

Finally, the January 11, 2002, sentencing proceeding commenced with the Court indicating that the nature of the dismissal of the 1988 charge remained in dispute. (Sentencing Tr. at 4.) Paul's attorney made it crystal clear that he was still challenging the attribution to Paul of the criminal conduct underlying the 1988 charge and that he considered it serious conduct that should not be allowed to remain on the PSI without independent evidence. (Id. at 5-7, 15, 17.) His attorney also asserted that the probation officer, rather than taking into consideration the perils of Paul's past, focused on "loading up the presentence report with every conceivable act of criminal misconduct that Mr. Paul could have committed, and then at the end suggesting he is a recidivist, there should be an upward departure." (Id. at 11; see also id. at 15-16.) He stated that he took "great and strenuous umbrage" with the report, observing: "In almost a quarter of a century of practicing law, I've never seen a more one sided report than this." (Id. at 23.)

The prosecution took the position that the Court could rely on the record before it that indicated that the 1988 burglary, attempted rape, and gross sexual misconduct indictment was dismissed because of pleas to other charges. (Id. at 19-20.) The Court overruled Paul's objections to the inclusion of the 1988 conduct, noting that it was alleged as other criminal conduct, not a conviction, and finding that the paragraph in the PSI "accurately reflects the docket entries as presented to the court." (Id. at 33-34.)

Paul's attorney made the Court fully aware of his objection to the inclusion of this paragraph in the PSI. The Court was willing to take the docket at face value without requiring further evidence from the prosecution. "There are countless ways to provide effective assistance in any given case," Strickland, 466 U.S. at 693. The fact that Paul's attorney may not have contacted Attorney Hjort for her version of the dismissal simply does not a Strickland deficiency make in view of his attorney's relentless efforts to challenge the attribution of this conduct to Paul. With respect to any court ordered counseling that may have flowed from the inclusion of this conduct in the PSI, Paul more than once conceded that he needed such counseling to turn his life around. Furthermore, it cannot be argued in light of the three other sex-offense convictions in Paul's criminal history that the appearance of this (highly contested) conduct in the PSI was the one thing that tipped the scales for the Court.

2. Development and Presentation of Evidence Relating to Paul's Childhood Abuse and Mental Health

Paul's next ground is that his attorney was ineffective in not investigating and developing available and relevant evidence about Paul's horrific childhood and continuing mental health problems during sentencing. He states that his mother was a schizophrenic who spent time in a mental institute and that he was subjected to severe beatings and other acts of humiliation at the hands of parents, other relatives, and strangers. He avers that he told his attorney at the time of the PSI's preparation that when he was fifteen-years-old his school ordered an evaluation of Paul yet his attorney never contacted the school to obtain the evaluation or investigate other facts concerning Paul's abusive childhood. Furthermore, Paul faults his attorney for failing to present mental evaluations from the Maine State Prison that would have demonstrated Paul's repeated

requests for psychiatric help. His attorney also failed to subpoena a therapist that Paul was seeing prior to the carjacking offense, an individual who could have testified that Paul had indicated just two weeks prior to the incident that "he felt like a bomb ready to blow up" and that stronger medication might be necessary. This information, Paul contends, would have rebutted the PSI's representations concerning Paul's mental state. In Paul's view his only ground for a downward departure was his history of mental illness; the fact that Paul had this childhood history of abuse and ensuing, continuing mental illness, coupled with his efforts to get help, would have supported this departure.

In his written objection to the PSI Paul's attorney fervently objected to the PSI preparer's characterization of Paul's mental status in furtherance of the PSI recommendation that Paul did not qualify for the acceptance of responsibility departure. (Gov't Resp. Ex A. at 2-4.) In particular, Paul's attorney faulted the PSI for challenging Paul's acceptance of responsibility entitlement on the ground that he claimed not to recall the specifics of his crime, while he admitted that he vividly remembered the events leading up to the incident. (Id. at 2.) Specifically, Paul's attorney highlighted the preparer's failure to include information about a 1988 Report by a clinical psychologist Bruce Kerr following Paul's 1988 rape conviction. This report indicated that Paul's poor memory of the actual crime was explainable, not as a deliberate evasion or denial, but as dissociation from aspects of his behavior most repugnant to Paul. (Id. at 3.) Counsel argued that Paul had explained to the PSI preparer that he had racing thoughts during the February 19, 2001, episode and that he described to Dr. Kerr that he experienced "rushing thoughts" at the time he committed the 1988 rape. (Id. at 3-4.) He argued that

Paul should not be denied acceptance of responsibility due to what is an explainable inability to remember details of the criminal incidents with specificity. (Id. at 4.)

Additionally, during the presentence proceeding Paul's attorney presented the Kerr report to the Court. (Presentence Conference Tr. at 16.) He further explained that Paul was sexually and physically abused by his parents and other children when he was growing up and emphasized that this troubled history went without mention in the PSI. (Id.)

That was not the end of the matter. The January 11, 2002, sentencing proceeding commenced with the Court indicating that "the impact of [Paul's] mental health and childhood upbringing on any sentence" remained at issue. (Sentencing Tr. at 4.) At this proceeding Paul's attorney persisted in arguing that Paul was the product of a troubled, abusive childhood, in need of treatment, and entitled to three points for acceptance of responsibility. (Id. at 24-28.)

Paul's attorney was successful on this score; the Court granted Paul the acceptance of responsibility reduction. (Id. at 34-35.) Furthermore, the United States sought an upward departure that was denied. Given this hard won success on the acceptance of responsibility concern there can be no Strickland prejudice in failing to pursue the evaluations of Paul by his school at fifteen-years and by the Maine State Prison. So too, no harm was done by not subpoenaing Paul's psychotherapist who saw him two weeks before the February 19, 2001, incident. Paul's attorney successfully convinced the Court without need of the additional evidence. To the extent that Paul is arguing his attorney demonstrated "serious incompetence" in failing to obtain a

downward departure from the 120 to 150 month guideline range, Paul's position is simply untenable.

B. The Notice of Appeal Ground

Finally, Paul argues that his attorney was ineffective by failing to perfect his appeal. Though he does not flesh-out the specifics behind this ground in his memorandum in support of his § 2255 motion, in his reply to the United States' response Paul describes how once he was sentenced, and brought back to the jail, he asked his attorney to please appeal the sentence. His attorney, however, "absolutely coerced" Paul's decision vis-à-vis the appeal at a time when Paul was depressed and suicidal. Paul states that the jail can verify his mental state at the time. "Clearly," says Paul, "I did want to appeal."[3]

Once again, the record contravenes Paul's assertions. At the conclusion of the January 11, 2002, sentencing proceeding the Court explained:

> Mr. Paul, you have the right to appeal the sentence that I've just imposed. In order to do that, you have to file with the clerk of this court within 10 days from today a written notice of appeal. If you fail to do that, you will lose your right of appeal. If you want to appeal your sentence and cannot get your lawyer to file the notice, you can ask for the clerk of court to file the notice for you and the clerk will do it, but it has to be within the 10 days.
>
> If you like, you can ask right now aloud here in open court for the clerk to file that notice, and the clerk will do it.
>
> If you cannot afford to prepay the costs of taking the appeal, you can request permission to proceed without prepaying costs, and if you qualify financially, you'll be permitted to do that. Do you understand what I've told you?

[3] In his reply to the United States' response, Paul states that prior to his guilty plea his wife told him on the phone that she had spoken with Paul's attorney and that his attorney had said that Paul had no choice but to plead guilty as there were too many witnesses. (Reply at 2.) Paul contends, also, that his attorney convinced him to plead guilty by stating that his chances of getting only seven to ten years would thereby improve. (Id.) While I have allowed Paul some leeway in countenancing the contents of his reply, section 2255 motions are not plead as "rolling starts" with the anticipation that the court will allow new factual assertions (let alone hearsay statements) to be introduced on an ongoing basis, and even after the United States has filed its response.

(Sentencing Tr. at 39-40.) Paul responded, "Yes, sir." (Id. at 40.) (See also R. 11 Tr. at 12-13.)

While still within the ten-day appeal period, Paul's attorney met with Paul on January 18, 2002, to discuss his appeal rights. (See Gov't Resp. Ex. C.) In the letter memorializing the visit the attorney wrote:

> As I indicated to you, given the fact that you plead Guilty to the offense, there would be nothing to appeal as far as your conviction is concerned. Likewise, with regard to your sentence, since Judge Hornby granted you the three (3)- level reduction for Acceptance of Responsibility, I do not believe that you would have any issue to appeal with respect to your sentence.
>
> As we discussed, the Court of Appeals would find no error with your sentence, as Judge Hornby sentenced you within the proper Guideline range of 120-150 months. Although he sentenced you to the maximum sentence of 150 months, that would not be found to be an abuse of discretion, given your criminal history which makes you a "Career Offender" for sentencing purposes.
>
> It is my understanding that you agree with my legal assessment and do not wish to file an appeal in your case. If you change your mind in this regard, **you must do so by January 21, 2002**, as your right to appeal expires after that date as Judge Hornby explained to you in Court that day.

(Id. at 1-2.) In a post-script counsel explained that he was in receipt of the January 15, 2002, letter by Paul (apparently related to the appeal concern). (Id. at 2.) Counsel clarified that it was counsel's understanding, based on the memorialized discussion, that Paul no longer wished counsel to file a notice of appeal on Paul's behalf. (Id.)

After the appeal period had run, on February 7, 2002, Paul wrote his attorney a letter. (Gov't Resp. Ex. B.) Therein he stated that he knew that the time for "wheeling and dealing" had passed. (Id. at 1.) The purpose of the letter was to recount threats made by Paul's fellow-inmate against Paul's probation officer. (Id. at 1-2.) It appears that Paul might have had further correspondence with his attorney that spring. (See Gov't Resp. Ex. D.)

Paul has not presented the hint of a factual basis for concluding -- despite the record evidence that the court and his attorney fully explained the right and grounds for appeal to him during the ten-day window of opportunity -- that his attorney coerced him into foregoing an appeal. See United States v. Butt, 731 F.2d 75, 80 n.5 (1st Cir. 1984)(collecting cases) ("Evidentiary hearings have been granted to § 2255 appellants who have claimed that their plea was induced by attorney misrepresentations only when the allegations are highly specific and usually accompanied by some independent corroboration."). As the First Circuit stated in David v. United States:

> To progress to an evidentiary hearing, a habeas petitioner must do more than proffer gauzy generalities or drop self-serving hints that a constitutional violation lurks in the wings. A representative case is Machibroda v. United States, 368 U.S. 487 (1962), in which the petitioner's section 2255 motion alleged that his guilty plea resulted from an unkept prosecutorial promise. After the trial court dismissed the motion without an evidentiary hearing and the court of appeals affirmed, the Supreme Court reversed, noting that "[t]he petitioner's motion and affidavit contain charges which are detailed and specific." Id. at 495. In a pithy passage that possesses particular pertinence for present purposes, the Court cautioned that a habeas petitioner is not automatically entitled to a hearing and normally should not receive one if his allegations are "vague, conclusory, or palpably incredible." Id. This is true, the Court wrote, even "if the record does not conclusively and expressly belie [the] claim." Id.
>
> Inferior courts routinely have applied the Machibroda standard in determining the need for evidentiary hearings on section 2255 motions. Allegations that are so evanescent or bereft of detail that they cannot reasonably be investigated (and, thus, corroborated or disproved) do not warrant an evidentiary hearing. See Dalli v. United States, 491 F.2d 758, 761 (2d Cir.1974) (holding that the district court supportably refused to convene an evidentiary hearing when the petitioner's allegations were "vague, indefinite and conclusory"); see also Amos v. Minnesota, 849 F.2d 1070, 1072 (8th Cir.1988) (upholding the denial of an evidentiary hearing in a section 2254 case inasmuch as petitioner "offered only general allegations").

134 F.3d 470, 478 (1st Cir. 1998); see also McGill, 11 F.3d at 225 ("When a petition is brought under section 2255, the petitioner bears the burden of establishing the need for an

evidentiary hearing. In determining whether the petitioner has carried the devoir of persuasion in this respect, the court must take many of petitioner's factual averments as true, but the court need not give weight to conclusory allegations, self-interested characterizations, discredited inventions, or opprobrious epithets," citations omitted). In light of the record in this case of counsel's and the Court's efforts to make Paul aware of his right to and the timing of an appeal, I cannot but view Paul's assertions vis-à-vis the notice of appeal to be self-serving and palpably incredible. And so I conclude that this third ground, too, is without merit.

Conclusion

For these reasons I recommend that the Court **DENY** Paul 28 U.S.C. § 2255 relief.

NOTICE

> A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which *de novo* review by the district court is sought, together with a supporting memorandum, within ten (10) days of being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.
>
> Failure to file a timely objection shall constitute a waiver of the right to *de novo* review by the district court and to appeal the district court's order.

April 29, 2003.

_____
Margaret J. Kravchuk

2255, CLOSED

U.S. Magistrate Judge

U.S. District Court
District of Maine (Portland)
CRIMINAL DOCKET FOR CASE #: 2:01-cr-00034-DBH-ALL
Internal Use Only

Case title: USA v. PAUL
Other court case number(s): None **Date Filed:** 04/24/01
Magistrate judge case number(s): 2:01-mj-00016

Assigned to: JUDGE D. BROCK HORNBY
Referred to: MAG. JUDGE MARGARET J. KRAVCHUK

Defendant(s)

WILLIAM L PAUL (1)
TERMINATED: 01/11/2002

represented by **WILLIAM L PAUL**
PRO SE

BRUCE M. MERRILL
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PORTLAND, ME 04101
775-3333
TERMINATED: 01/11/2002
LEAD ATTORNEY
ATTORNEY TO BE NOTICED
Designation: CJA Appointment

Pending Counts	**Disposition**
18:2119.F MOTOR VEHICLE THEFT - CARJACKING (1)	One Hundred Fifty Months Incarceration followed by a Three Year Term of Supervised Release. .00 Special Assessment and Restitution in the amount of .00

Highest Offense Level (Opening)

Felony

Terminated Counts

None

Disposition

Highest Offense Level (Terminated)

None

Complaints
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carjacking, with the intent to cause death or serious bodily harm, and aiding and abetting such conduct, 18:2119(1) [2:01-m-16]

Plaintiff

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